No. 20,939

See Vol. 3381

In the

United States Court of Appeals

For the Ninth Circuit

WESTERN CONSTRUCTORS, INC.,
a corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Petition of Appellee, Southern Pacific Company, For Rehearing

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In its Decision of July 10, 1967 the Court of Appeals reversed the judgment of the lower court, by concluding that there was evidence of wanton negligence on the part of the operators of appellee's train. From the following excerpts (pages 6 and 7 of the Decision) this conclusion appears to be based upon (1) the fact that the train approached the private crossing in question at a high rate

of speed *under the circumstances* (63-65 mph), and (2) the possibility that the train operators thereafter failed to apply the train brakes.

> "In the light of his testimony that the train's weight and momentum would prevent the slightest reduction of speed within the distance in question, it seems to us that a jury might have found that there was 'wanton' negligence in the circumstances in failing to reduce the speed more than two miles per hour for 'better control'."
>
> "As previously recited, the railroad undertook to explain the lack of diminution of speed by emphasis upon the weight and momentum of its equipment. In this connection it should be pointed out that the train consisted of two locomotives and eighty cars. It weighed almost four thousand tons. Negligence, whether ordinary or wanton, is a relative term. The duty of care increases with the degree of danger which should reasonably be apprehended. One is required to conduct his affairs in the light of the reasonably foreseeable consequences of his acts, and the foreseeable consequences of a four thousand-ton freight train's colliding with any substantial object while traveling at sixty miles per hour are clearly grave."
>
> "The train's operators testified that the train's brakes were applied, but the jury was not, of course, required to accept this testimony."
>
> "Portions of the tapes from the speed recording devices indicate speed variations which could support an inference that, had the engineer made emergency application of brakes, as he testified that he did at the time when, according to his testimony, he saw the contractor's vehicle stalled upon the tracks, the train would have slowed considerably before it reached the point of collision. Thus, the evidence did not foreclose a determination that the train's brakes were not applied. If they were not, one might infer that the train's operators did not see the stalled vehicle. Fully aware of

> the construction work ahead, with the necessary movement of vehicles which caused the engineer himself to realize the need for 'better control' of his train in order to avoid danger which he himself foresaw, the engineer could have been found guilty of wanton negligence in neglecting vigilance or, in the circumstances, operating a four thousand-ton train at a speed of sixty miles per hour and, without the application of brakes, maintaining the speed in heedless disregard of observed danger."

If this were a public crossing located somewhere else, circumstances could be conceived wherein it might be wanton negligence for a train to approach at 60 miles per hour or more. But to so hold under the circumstances of this case is difficult to accept, because of the private crossing agreement, the extraordinary precautions that were provided, and the unlikelihood of encountering a stalled vehicle on the tracks.

There is no implication in the private crossing agreement, entered into gratuitously by the railroad, that it should curtail or delay its operations on account of the contractor's use of the crossing. On the contrary, it was clearly the intendment of the agreement that the crossing would create no impediment to its trains whatever.

Special safety features were provided to prevent an accident at the crossing—automatic warning signals, a flagman, and a special manual warning switch. The accident occurred on straight track and in broad daylight.

None of the contractor's vehicles had ever stalled on the track before. Though the possibility of a vehicle stalling always exists, certainly this cannot be the circumstance that led the Court to reach its wanton negligence conclusion, for this would impose upon the railroad a duty to operate its trains at such a reduced speed so as to be prepared

and able to stop at the crossing for any eventuality. This certainly does violence to the agreement of the parties, particularly if the consequence of failing to comply with such a duty is classifiable as wanton.

In the last two excerpts from its Decision the Court states that there is a permissible inference that the train operators failed to apply the brakes.

The testimony of the engineer and fireman that they did apply the brakes in emergency is confirmed by the testimony of the contractor's employees, and there is no testimony to the contrary. When the train brakes are placed in emergency the headlight of the locomotive automatically turns red. (R.T. 405, 406) The contractor's employees, Kness and Avila, both testified that while they were trying to push the "carryall" on over the tracks they saw the headlight of the train was red. (R.T. 186, 189, 234) When they quit pushing and ran, the train was at the block signal half a mile away. (R.T. 169, 218) There can therefore be no room for a finding that the brakes were not applied, or for an inference that the train's operators failed to see the stalled vehicle. That they did see is further proved by their undisputed testimony that the train whistle was sounding. (R.T. 267)

Inferences to the contrary should not be drawn from speed variations indicated by the speed tape recording alluded to by the Court, for the reason that the tape merely records the variations in speed and does not indicate how far in advance the brakes were applied in order to produce the variations. Absent this knowledge, it is not possible to deduce from the tape how long it takes after the brakes are applied to reduce the speed.

Moreover, the question of whether the brakes were applied or not is immaterial, because there is no competent evi-

dence to show that the train could have been stopped and the collision avoided by their application.

For the foregoing reasons Appellee respectfully petitions the Court for a rehearing of this cause, and requests that, upon such rehearing, the judgment of the United States District Court for the District of Arizona be affirmed.

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The undersigned hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and is not interposed for delay.

RALPH J. LESTER
Ralph J. Lester